(8)

No. 00-1491

Supreme Court, U.S.
FILED
FEB 13 2002
CLERK

In The

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,

Petitioner,

v.

GUILLERMO NUEVA And LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

JACQUELINE JORDAN LEUNG
(*Counsel of Record*)
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street,
25th Floor
P. O. Box 12925
Oakland, CA 94604-2925
(510) 834-4350

SANDRA B. STERN
THE LAW OFFICES OF SANDRA B. STERN
16133 Ventura Blvd.,
Suite 1280
Encino, CA 91436-2416
(818) 905-5667

ROBERT J. STOLL, JR., ESQ.
STOLL, NUSSBAUM & POLAKOV
11601 Wilshire Boulevard,
Suite 200
Los Angeles, CA 90025
(310) 996-7500

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12pp

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Adams v. Royal Indemnity
99 F.3d 964 (10th Cir. 1996) 5

STATE CASES:

ACL Technologies, Inc. v. Northbrook Prop. & Cas. Ins. Co.
17 Cal.App.4th 1773 (CA 1993) 2

Titan Corp. v. Aetna Cas. & Surety Co
22 Cal.App.4th 457 (CA 1994) 2

STATUTES:

California Insurance Code
Section 11580.1(b)(4) 8, 9

SUPPLEMENTAL BRIEF

Respondents Guillermo Nueva and Los Angeles County Metropolitan Transportation Authority submit this supplemental brief under Supreme Court Rule 15.8 to comment upon the brief *amicus curiae* filed by the Solicitor General of the United States on January 3, 2002.

Respondents agree with the Solicitor General that the petition before this court should be denied. However, Respondents file this supplemental brief to reinforce several points relied upon by the Ninth Circuit in reaching its opinion below which do not appear to have been adequately considered by the Solicitor General: (1) the clear and unambiguous language of the John Deere insurance policy at issue; (2) the public policy behind the MCS-90 endorsement as expressed in the clear language of the endorsement itself; (3) an apparent misunderstanding of basic coverage and tort law in the motor vehicle context where, in the vast majority of cases, it is the driver (permissive user) at fault and legally liable who is also an "insured" under the basic policy issued to the motor carrier as the owner of the vehicle; and (4) the mandatory California statutes requiring insurance policies to provide coverage for permissive users to the same extent as named insureds, as in the case at bar.

As the Ninth Circuit noted below, the clear and unambiguous policy language set forth in John Deere's insurance policy issued to Sahota expressly defined the term "insured" to include not only the "named insured" but also the permissive users of the named insured's vehicles. The MCS-90 endorsement says expressly that it modifies the policy to require coverage for all owned vehicles, so the limitation in the definition of insured is specifically expanded. Here, it is undisputed that Sahota

(the named insured) granted Garcha (the permissive user) permission to operate Sahota's owned vehicle at the time of the subject accident.

When the express policy language, and endorsement language at issue is plain and unambiguous, there is no need to go outside the express terms to determine the meaning of the phrase "the insured". *Titan Corp. v. Aetna Cas. & Surety Co.*, 22 Cal.App.4th 457, 469 (CA 1994). The express policy language of John Deere's policy issued to Sahota, including the MCS-90 endorsement, clearly define "insured" to include both Sahota (the named insured) and Garcha (the permissive user operating Sahota's vehicle). Unfortunately, in its *amicus curiae* brief, the Solicitor General completely ignored the express policy language at issue.

In an attempt to avoid being bound by the express policy language that John Deere (Petitioner) actually wrote and therefore should be bound by, Petitioner has asserted that there is now a need to go outside the express policy definition of the term "insured" so as to limit that definition to only the "named insured". Petitioner has attempted to convince this Court that there is now a need to look at how the legislature defines the phrase "insured" in the legislation that promulgated the MCS-90 endorsement attachment to the John Deere policy issued to Sahota. There is no such need. The Solicitor General has erred in finding such a need. Under California insurance coverage law, reference is made to drafting history only when there is first found to be an ambiguity. *ACL Technologies, Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal.App.4th 1773, 1790-1791 (CA1993). No such ambiguity exists in this language so no reference to drafting history is necessary in this basic contract interpretation.

As the Ninth Circuit below has found, the express language of the MCS-90 endorsement attached to the John Deere policy at issue provides:

> **In consideration of the premium stated in the policy to which this endorsement is attached,** the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance, or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 **regardless of whether or not each motor vehicle is specifically described in the policy.** . . . It is understood and agreed that no condition, provision, stipulation, or limitations contained in the policy, this endorsement, or any other endorsement . . . shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. **However, all terms, conditions, and limitations in the policy to which this endorsement is attached shall remain in full force and effect as binding between the insured and the company.** (Emphasis added).

The clear, unambiguous, and express language of the MCS-90 endorsement at issue and the clear legislative intent as set forth directly in that endorsement is to maintain all definitions of the term "insured" as defined in the underlying policy, while expanding the policy provision to include all vehicles owned by the insured, even if not specifically described in the policy. Unfortunately, the Solicitor General did not even address this express

language of the MCS-90 endorsement in its Brief. However, this was clearly relied upon as well by the Ninth Circuit in reaching its decision below.

In the case at bar, Respondents obtained a final judgment against Garcha, Sahota's permissive user, while operating a vehicle owned by Sahota. Pursuant to the express language of both the John Deere policy and the MCS-90 endorsement, Petitioner is obligated to pay those final judgments.

Moreover, Petitioner collected an **additional premium** from Sahota for the **expansion of coverage** provided by the MCS-90 endorsement. The MCS-90 endorsement at issue was obviously meant to expand the underlying policy coverage – not limit the coverage to a more restricted definition of the term "insured" than that set forth in the underlying insurance policy itself.

Further, with respect to this Court's response to the petition, Petitioner's brief asserts that there is a circuit conflict which the Supreme Court should resolve. As set forth in Respondents' opposition brief, the few cases cited by Petitioners either involve inter-insurer disputes which are irrelevant here, or involve completely different issues or endorsements.[1] There are two circuit decisions which are in complete agreement with each other. No circuit split exists that needs resolving.

---

[1] The United States notes the cases involving inter-insurer conflict and that a court might also consider this significant in a future case (U.S. Br. at 15-16), while Petitioner's Supplemental Brief suggests that this is not a "salient distinction." On the contrary, as set forth in Respondents' Opposition Brief at pg. 15, there are extensive cases finding this distinction very salient. If one insurer has a direct obligation, and the second insurer only has an obligation if the MCS-90 is applied, there is no need to

Petitioners also assert that this case involves an issue that is important and recurring. As the United States pointed out in its brief, the circumstances here are very unique and they have not been litigated with any great frequency in the past, or since the decisions in this case or the *Adams v. Royal Indemnity*, 99 F.3d 964 (10th Cir. 1996) case. (U.S. Br. at 18.) Further, regulatory proceedings are available to repair any error in interpretation. (U.S. Br. at 19.)

Respondents therefore request this Court to deny the petition. Respondents believe that even if the Ninth Circuit was instructed to review its decision, it would have to apply California statutory provisions to these issues and rule in favor of Respondents yet again under state law rather than federal law.

Petitioners and *amicus curiae* give little more than a token nod to the admitted public policy of the MCS-90 endorsement, to protect the general public from uninsured vehicles used by interstate carriers. This policy would be completely frustrated if this Court holds that the MCS-90 endorsement does not apply to judgments against anyone except the named insured motor carrier. This would provide specific incentive for motor carriers to simply give permission to others to use their vehicles, but not purchase insurance for the vehicles. If an accident occurs, the public is out of luck. Most states limit an owner's indirect or vicarious liability to the minimum financial responsibility limits, disallowing judgments against motor carriers beyond a minimal $15,000 for

---

find expanded coverage because the public is already protected by the insurer with a direct obligation. Those cases do not apply here.

bodily injury and $5,000 for property damage. If there is an accident, the owner's limits are probably less than insurance premiums would have been.

Public policy requires protection of the public. This policy is not addressed if the MCS-90 endorsement is limited in the way Petitioners request.

The United States believes that it is not central to the regulatory purpose to cover judgments against anyone other than the motor carrier itself. It argues that if the motor carrier is "legally responsible – directly, indirectly, or vicariously", then the plaintiff could obtain a judgment against the motor carrier. As noted, in vehicle accidents, it is rare that the motor carrier is directly at fault – it is the drivers (permissive users) who are at fault. Occasionally, one will find a motor carrier has negligently maintained a vehicle or negligently hired a driver with a poor driving record. In those cases, the usual state statutes limiting an owner's liability to minimal levels do not apply. The motor carrier "insured" has direct liability. Thus, plaintiffs can obtain a judgment directly against the motor carrier.

The negligent liability of the drivers is what the public must concern itself with. Because the motor carrier's legal liability for its driver's acts is vicarious and is limited to minimal levels, the MCS-90 endorsement would add nothing if applied as the United States suggests. Further, the MCS-90 endorsement specifies that it covers liability for "negligence in the operation, maintenance of use of motor vehicles." Motor carriers cannot be negligent in operation and use, as corporations do not operate a vehicle – only the driver can. This language becomes redundant and meaningless if the United States'

interpretation that only judgments against the motor carrier matter were to stand.

It is drivers who are negligent and drivers from whom the public must be protected. Most policies, including the John Deere policy at issue here, add the drivers as permissive user-insureds, because the policy would rarely apply if the drivers were not insureds. The policy defines "insured" as both the named insured motor carrier and anyone else using a covered auto you own with your permission. Interpreting the MCS-90 endorsement as the United States and Petitioner argue as only applying to the motor carrier is much more restrictive than the policy it is supposed to expand upon. The endorsement repeatedly uses the phrase, "the insured" and Petitioners want this to mean only the motor carrier or the named insured. In the context of insurance policies, the named insured is the entity listed on the declarations [face] page of the policy. But it is not the only insured. All policies have a section entitled something on the lines of "Who Is An Insured." That section in the John Deere policy defines "insured" to include permissive users. The John Deere policy which incorporates the MCS-90 endorsement, like every other insurance policy, uses the phrase "insured" dozens, if not hundreds of times. In each instance, the word "insured" includes permissive users. All the drivers of Sahota's covered vehicles are "insureds" under the John Deere policy by its very terms. Why would an endorsement attached to a policy use "the insured" differently than it is defined in the same policy? The MCS-90 endorsement specifically states that "all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the

company." The MCS-90 endorsement contains several definitions, notably none for "insured." Thus, the simple answer is that the John Deere policy's definition of "insured" which include permissive users is the definition that applies.

The Solicitor General mistakenly notes at pg. 10 that the MCS-90 endorsement can only "sensibly be read to refer to the named insured." The Solicitor General unfortunately does not understand insurance coverage law. As set forth above, it is not sensible to interpret an MCS-90 endorsement to an insurance policy as only covering judgments against a named insured when the policy itself is broader than that. It is not sensible and it is not sound regulatory interpretation.

This leads to Respondents' final point. California state law, as well as the law of every state of which Respondents are aware, mandates that insurance policies cover permissive users in the same manner as they cover named insureds. The public policy reason for this is the same as that of the ICC when it promulgated the MCS-90 endorsement. That is, it is drivers who are largely at fault and the public needs to be protected from negligent drivers by making sure that they have insurance covering them.

The government never addressed California state law in its brief. Insurance Code § 11580.1, set forth in App. 1 to Respondents' opposition brief, provides specifically that all policies must insure permissive users of "any owned or leased motor vehicles" in the same manner as it insures the owner.

The Ninth Circuit Court of Appeal's decision did not reach state law because it did not need to; it ruled in Respondents' favor under federal law. If this Court

remands this case to the Ninth Circuit with instructions to follow the government's brief, the simple fact is that the Ninth Circuit can do that, but will still rule in favor of Respondents under California state law.

Section 11580.1 applies to vehicles "covered by the policy." The MCS-90 endorsement states that it applies to all motor vehicles "regardless of whether or not each motor vehicle is specifically described in the policy. . . . " The MCS-90 endorsement's public policy is to make sure that any and all vehicles owned by the motor carrier, whether he drives it himself or allows others to do so, are covered by the MCS-90 endorsement.

In addition, the John Deere policy issued to Sahota also contains a California endorsement similar to the MCS-90 endorsement. Neither the District Court nor the Ninth Circuit reached any conclusion regarding this endorsement. The DOT's interpretation of the MCS-90 endorsement has no bearing whatsoever on California's interpretation of its own PUC endorsement. It can be expected that California regulators would be inclined to protect the members of the public by interpreting its endorsement in conjunction with its express statutes requiring permissive user coverage.

The law now requires that John Deere pay the final judgments entered against Sahota's permissive user and then collect reimbursement for it from Sahota, who purchased insurance from John Deere. The MCS-90 endorsement's only purpose is to expand coverage beyond that of the policy. If it is limited to the policy language, it has no effect. It expands coverage to all vehicles owned by the motor carrier and driven by anyone. It covers judgments

rendered against anyone regarding that vehicle, including the one person most likely in 99% of cases to have a judgment against him – the permissive user/driver.

This petition should be denied and the Ninth Circuit ruling left intact.

Respectfully submitted,

JACQUELINE JORDAN LEUNG
(*Counsel of Record*)
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street, 25th Floor
Oakland, CA 94604
(510) 834-4350

SANDRA B. STERN
THE LAW OFFICES OF SANDRA B. STERN
16133 Ventura Blvd., Suite 1280
Encino, CA 91436-2416
(818) 905-5667

ROBERT J. STOLL, JR., ESQ.
STOLL, NUSSBAUM & POLAKOV
11601 Wilshire Boulevard, Suite 200
Los Angeles, CA 90025
(310) 996-7500

Attorneys for Respondents

DATED: February 13, 2002